

Internal Revenue Service

memorandum

CC:TL:TS/VWATERS

TL-N-7397-89

date: SEP 1 1989

to District Counsel, Phoenix SW:PNX
Attn: Marikay Lee-Martinez

from Acting Chief, Tax Shelter Branch CC:TL:TS

subject: [REDACTED] - TEFRA Statute of Limitations

This memorandum is in response to your May 23, 1989, request for tax litigation advice regarding the above-mentioned subject.

QUESTIONS PRESENTED

1. Whether a docketed Tax Court case, open under I.R.C. § 6501(a), can keep the TEFRA statute of limitations for affected items for the same year open under section 6229(a)?

2. Whether there is any other interpretation of section 6501(a) and section 6229(a) which would allow the Service to plead that the year is open for assessment and collection of the affected items?

CONCLUSIONS

1. The docketed Tax Court case open under section 6501(a) does not enable the Service to issue a notice of deficiency for the [REDACTED] affected items. Section 6501 cannot operate to extend the period of limitations of section 6229 because the two periods of limitations are separate.

2. Prior to the expiration of the period of limitations for the [REDACTED] taxable year, the Service could have amended its answer to raise the penalties for that year. However, because the period of limitations expired in [REDACTED] this course of action is no longer available to the Service.

FACTS

The Service issued petitioners a notice of deficiency for all non-TEFRA items for the year [REDACTED] within the time period allowed under section 6501(a). This case was petitioned and

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answered. Subsequently, the Service issued the petitioners three separate notices of deficiency for the years [REDACTED], [REDACTED], and [REDACTED]. These notices covered carryback penalties resulting from a TEFRA audit. The partnership defaulted on its FPAA and these notices were issued within one year of the default. These three notices of deficiency were petitioned under one docket number, and the Service has answered the petition.

The Service failed to issue a separate notice of deficiency for the [REDACTED] penalties relating to the same TEFRA entity that generated the adjustments for the [REDACTED], [REDACTED], and [REDACTED] taxable years. The statute of limitations for issuing this notice expired in [REDACTED], one year after the partnership's default on the FPAA. The schedule attached to each of the notices of deficiency for the [REDACTED], [REDACTED] and [REDACTED] years reference adjustments for the [REDACTED] penalties. However, no notice of deficiency was sent for that year on the TEFRA penalties. The only notice of deficiency for the [REDACTED] year is the one for all non-TEFRA adjustments.

DISCUSSION

I. The Interrelationship Between Section 6229(a) and Section 6501

The Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") provided for a unified partnership level audit and proceeding. Section 6229(a) provides that the period for assessing any tax imposed by subtitle A attributable to partnership or affected items shall not expire before three years after the later of the date the partnership return was filed or the last day for filing such a return. Section 6229(g), added by the Tax Reform Act of 1986, provides that the period of limitations for assessment with respect to partnership and affected items also applies to penalties and additions to tax.

The first point to be addressed is the question of whether section 6229(a) and section 6501(a) are separate periods of limitations for assessment or whether section 6229(a) is an extension of section 6501(a). Section 6501(a) provides in pertinent part:

(a) General Rule. - Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed.

The return referred to in section 6501(a) is the partner's individual income tax return. In comparison, the period for assessment under section 6229(a) is based upon the filing of the partnership return.

Section 6229(a) clearly states that it is limited to partnership and affected items. What is not clear is whether section 6229(a) is the exclusive period of limitations for assessment of partnership and affected items. There are two possible interpretations of the general rule found in section 6229(a). One approach is that the three year period of limitations of section 6501(a) covers all items, including partnership items. Under this interpretation, section 6229 merely operates to extend the period of limitations under section 6501 with respect to partnership items. This approach is referred to as the statute extension approach. The other approach is that section 6229(a) sets out a separate three year period of limitations for partnership items, while section 6501 refers only to nonpartnership items. This approach is known as the separate statute approach.

The Service's position is that these sections establish separate periods of limitations. The Service has adopted the separate statute approach in order to foster protection against expired periods of limitations. Accordingly, in the present case, the docketed Tax Court case, open under section 6501(a), does not extend the section 6229 period of limitations to enable the Service to issue a notice of deficiency for the [REDACTED] TEFRA penalties. The Service cannot issue a notice of deficiency for the TEFRA penalties because the period of limitations for issuing this notice expired in [REDACTED] pursuant to section 6229.

II. Amendment of the Answer to Enable the Service to Plead that the [REDACTED] Taxable Year is Open for Assessment and Collection of the Affected Items

You have also asked whether the period of limitations may be open for the [REDACTED] affected item additions to tax under some other theory. For the reasons explained below, we believe that the period of limitations for assessment of the [REDACTED] affected item additions to tax has already expired.

As stated above, section 6229(a) provides a three year period of limitations for assessment of tax attributable to partnership items and affected items (including additions to tax). I.R.C. § 6229(g). The issuance of the notice of final partnership administrative adjustment ("FPAA") for the [REDACTED] taxable year suspended the period of limitations for the period during which an action could have been brought under section 6226 (150 days) and for one year thereafter. I.R.C. § 6229(d).

In order to assess affected item additions to tax for taxable year [REDACTED] following the default on the FPAA, the Service was required to follow the deficiency procedures of subchapter B of chapter 63 of the Code. I.R.C. § 6230(a)(2); Temp. Treas. Reg. § 301.6231(a)(6)-1T(c). Consequently, unless a statutory notice of deficiency was issued with respect to those items or

some other action were taken to suspend the period of limitations, that period expired in [REDACTED], one year after the time for bringing an action on the FPAA had passed.

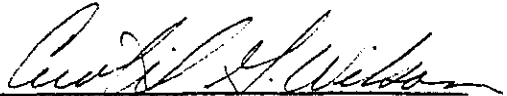
No statutory notice for [REDACTED] affected item additions to tax was issued in this case. The only statutory notice for [REDACTED] related exclusively to nonpartnership items. Although the taxpayers filed a petition contesting that notice of deficiency, neither the notice nor our answer raised the [REDACTED] affected item additions to tax. Had the Service timely amended its answer to raise those affected item additions to tax in the Tax Court deficiency proceeding, the period of limitations would have been suspended under section 6503 pending final resolution of that proceeding and for 60 days thereafter.^{1/} However, because the Service did not amend its answer to specifically raise the affected item additions to tax within the one year period of limitations under section 6229(d), we believe that the period of limitations has expired.

In addition, we concur with your conclusion that the issuance of statutory notices of deficiency for affected item additions to tax for taxable years [REDACTED], [REDACTED] and [REDACTED] did not prevent the period of limitations for [REDACTED] affected item additions to tax from expiring merely because a single statutory notice for all four taxable years could have been issued. Partnership items and affected items have a separate period of limitations for each taxable year under section 6229(a). The issuance of a statutory notice of deficiency for affected item additions to tax for one year suspends the period of limitations pursuant to section 6503(a)(1) with respect to that taxable year only. The mere fact that the statutory notice could have included more than one taxable year would clearly not suspend the period of limitations for any or all other years that might have been included in the notice as well.

^{1/} Section 6503(a)(1) provides, in part:

(1) General Rule. - The running of the period of limitations provided in . . . section 6229, but only with respect to a deficiency described in section 6230(a)(2)(A) on the making of assessments or the collection by levy or a proceeding in court, in respect of any deficiency as defined in section 6211 . . . shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

If you have any additional questions regarding this matter,
please contact Vada Waters at (FTS) 566-3289.


CURTIS G. WILSON